APPEAL NO. 032803
FILED DECEMBER 10, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on September 17, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, because he was intoxicated at the time of his on-the-job injury, and that because there was no compensable injury the claimant did not have disability. The claimant appealed on sufficiency of the evidence grounds. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The primary issue in this case is whether the claimant was intoxicated as a result of marijuana use at the time of his motor vehicle accident (MVA) on _____. Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 401.013(b)(2)(B), the intoxication provision applicable in this case, defines intoxication as not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002 of the Texas Health and Safety Code. An employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury, that is that he or she had the normal use of his or her faculties at the time of the injury. In this instance, the hearing officer properly determined that the positive drug screen was sufficient to shift the burden to the claimant to prove that he had the normal use of his mental or physical faculties at the time of the claimed injury.

The record reflects that the claimant was employed as a long haul truck driver. On Monday, _____, he was injured when he entered a curve too fast, he lost control of his truck, and it rolled. The MVA occurred in (State 1). The claimant testified that he did not smoke marijuana on the day in question, and that he was not intoxicated at the time of the injury. The claimant did testify to having used marijuana on the Thursday prior to the MVA.

A State 1 State Trooper arrived on the scene and his report was in evidence. The report reflects that the MVA occurred at 8:35 a.m.; that the officer arrived on the scene at 8:50 a.m. and interviewed the claimant at that time; that no alcohol or drugs were suspected; and that the claimant's physical condition was "apparently normal."

The claimant was transported to the hospital for treatment. Records from the hospital indicate that the claimant was alert and oriented, and that his pupils were equal and reactive to light. A drug screen was performed on the same date of the MVA. The drug screen came back positive for marijuana metabolite. The results reflect that the level of marijuana metabolite was 51 nanograms per milliliter (ng/ml). In evidence is a letter from Dr. P, who is a medical review officer with American Medical Review Officers, L.L.C. Dr. P's letter states:

> Note: Per Dept. of Transportation (DOT) rules the results of this test only indicate use and should not be extrapolated and used to determine impairment. Urine drug screen quantitative results rarely provide useful information regarding amount/time/frequency of use or impairment.

Additionally, the carrier requested a toxicology consultation from Dr. C. In his report, Dr. C concludes that "[t]he urine drug screen does not support a reasonable medical probability opinion of marijuana-related impairment at the time of the accident."

In the present case, the hearing officer found that there was sufficient evidence to shift the burden of proof of sobriety to the claimant, and that the claimant "has not met his burden of proof to demonstrate that he was not impaired through the use of a controlled substance at the time of sustaining the injury made the basis of this case." The hearing officer concluded that the claimant's injury occurred while he was in a state of intoxication. The issue of whether the claimant was intoxicated at the time of the injury was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a hearing officer's factual determination only if it is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Our review of the record indicates that the hearing officer's intoxication determination is reversible under that standard.

It is troubling that the hearing officer makes no mention of the police officer's report, the low amount of marijuana metabolite found, the opinion of the carrier's toxicologist, or the physical examination findings at the hospital. The hearing officer focused on the "history" of the claimant's usage, as written in the hospital records, and concluded that based upon that, the claimant "very well may have been impaired on the morning of the accident." By failing to address the evidence supporting the claimant's assertion that he was not intoxicated at the time of the injury, not the least of which is the opinion of the carrier's own expert, the hearing officer gives no guidance as to why she discounted it. The test in an intoxication case is not whether or not the claimant has a history of using a given substance, it is whether or not he or she was intoxicated at the time the injury occurred. Thus, the hearing officer erred in determining that the claimant was intoxicated at the time of the injury and that, as a result, he did not sustain a compensable injury pursuant to Section 406.032(1)(A).

Regarding the issue of disability, the hearing officer's finding of fact that the claimant was unable to obtain and retain employment equivalent to his preinjury wage, due to the physical injuries from the accident, from March 11 through August 28, 2003, was unappealed. Having reversed the hearing officer's determination that the claimant was intoxicated, we reverse her legal conclusion that the claimant did not have disability and render a decision that the claimant had disability from March 11 through August 28, 2003, based upon the hearing officer's unappealed factual finding.

The hearing officer's determinations that the claimant was intoxicated at the time of his _____, injury; that he did not sustain a compensable injury; and that he did not have disability are reversed and a new decision rendered that the claimant was not intoxicated at the time of his injury; that he sustained a compensable injury; and that the claimant had disability from March 11 through August 28, 2003.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY**
**800 BRAZOS, SUITE 750, COMMODORE 1**
**AUSTIN, TEXAS 78701**.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge